Supreme Court, U.S.
FILED

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM RUSSELL AIKEN, et al
Petitioner(s)

v.

CITY OF MEMPHIS, TENNESSEE
Respondent

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. §207(o), and the Department of Labor's implementing regulations, may, absent an agreement defining "reasonable period" between the parties, refuse to grant an employee's request to use accrued compensatory time because granting the request would require the employer to pay overtime wages to a replacement employee, on the basis that the request was not submitted within a reasonable period when granting the request would cause no undue disruption to the employer's operation?

2) Whether the Sixth Circuit's decision to apply federal appellate caselaw regarding the compensability of on-call time to its decision concerning the City's Location While Ill Policy violates the FLSA has

resulted in the Court deciding a federal question in a way that conflicts with relevant decisions of this Court and with relevant Department of Labor regulations.

LIST OF PARTIES

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Michael	Arendale
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Richard	Bennett
Joseph	Benya
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Anthony	Bianchi
John	Binger
Richard	Birdsong
Bradley	Bland
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Holly	Bolden-Cooper
Martin	Boldt
Alan	Boone

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Patricia	Manning

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Jamie	Mayo
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Ernie	McCommon
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Gregory	McGaughy
Joseph	McIntosh
Larry	McKee
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Donald	Owens
Vennes	Owens
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Joseph	Pearlman
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Donald	Robinson
John	Roe
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Robert	Scoggins
Mark	Seay
James	Sewell
Robert	Shemwell
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Cecil	Shults
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Larry	Skaggs
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Glenn	Williams
Samuel	Williams
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Michael	Wilson
Octavia	Winfrey
Mark	Winters
Edward	Wood
Charles	Woods
James	Woods
Marvin	Woods
Shirley	Woods
James	Wooten
Theodore	Wooten
Joseph	Wright
Ernie	Writesman
Celia	Young
Jimmy	Young
Russell	Young
Robert	Young, Jr.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

WILLIAM RUSSELL AIKEN, et al., Petitioners

v.

CITY OF MEMPHIS, TENNESSEE, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

William Russell Aiken and other Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App., *infra* 1), is reported at *Aiken v. City of Memphis*, 190 F.3d 753, 139 Lab.Cas. P 33,957, 5 Wage & Hour Cas.2d (BNA) 961, 1999 Fed.App. 0320P. The opinion of the District Court (App., *infra* 3) is reported at *Aiken v. City of Memphis*, 985 F.Supp. 740, 135 Lab.Cas. P 33,668, 4 Wage & Hour Cas.2d (BNA) 408; and its ruling on summary judgment (App., *infra* 4) is unreported.

STATEMENT OF JURISDICTION

The Court of Appeals for the Sixth Circuit entered its judgment on September 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF STATUTES, ORDINANCES & REGULATIONS

29 U.S.C. §207(o) provides as follows:

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—
(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees . . . and
(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3). . . .

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and
(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

29 C.F.R. §553.23 provides as follows:

(a)(1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7(o)(2)(A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees. . . .

29 C.F.R. §553.25 provides as follows:

(c) Reasonable Period.

(1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff. (2) The use of compensatory time in lieu of cash payment for overtime must be pursuant to some form of agreement or understanding between the employer and the employee (or the representative of the employee) reached prior to the performance of the work. (*See* §553.23.) To the extent that the (conditions under which an employee can take compensatory time off are contained in an agreement or understanding as defined in §553.23, the terms of such agreement or understanding will govern the meaning of "reasonable period".

(d) Unduly Disrupt. When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

29 C.F.R. §553.221 provides as follows:

(c) Time spent away from the employer's premises under conditions that are so circumscribed that they restrict the employee from effectively using the time for personal pursuits also constitutes compensable hours of work. For example, where a police station must be evacuated because of an electrical failure and the employees are expected to remain in the vicinity and return to work after the emergency has passed, the entire time spent away from the premises is compensable. The employees in this example cannot use the time for their personal pursuits.

(d) An employee who is not required to remain on the employer's premises but is merely required to leave word at home or with company officials where he or she may be reached is not working while on call. Time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits. Where, for example, a firefighter has returned home after the shift, with the understanding that he or she is expected to return to work in the event of an

emergency in the night, such time spent at home is normally not compensable. On the other hand, where the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable.

STATEMENT OF THE CASE

Petitioners, certain past and present City of Memphis (City) police officers, filed their initial suit on January 7, 1993, alleging that the City failed to pay them overtime wages in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. §201 et seq. During the litigation, Petitioners alleged that the City violated the FLSA by failing to pay them overtime compensation for: (1) time spent confined at home during sick leave or on-the-job injury leave under the City's "Location When Ill" policy; (2) time spent by canine officers commuting in police vehicles while transporting and controlling their dogs; (3) general time spent commuting in police vehicles and on vehicle maintenance; (4) training time; and (5) time spent on maintenance and care of police dogs. In addition, Petitioners alleged that certain practices followed by the City were in violation of the FLSA, including its compensatory time policy under which they are not allowed to take compensatory time off when a department supervisor

has decided that too many other officers have already signed up to be off on a particular day and its decision to treat police captains as exempt from overtime provisions of the FLSA.

I. Statement of Facts.

The Respondent, City of Memphis, is a political subdivision of the State of Tennessee and is a public agency subject to the provisions of the FLSA. 29 U.S.C. §203(e)(2)(C). The City and Petitioners negotiated a Memorandum of Understanding which provides that officers who earn overtime may request compensatory time off which will be given through the use of a log book. Under this plan, the officer who elects to receive compensatory time off in lieu of cash payment for overtime requests time off by signing his or her precinct's compensatory time off log book at any time within thirty days of the requested day off. Not all requests for compensatory time off were granted. For instance, the commanding officer of each precinct may close a precinct's log book after a determination is made that

further requests for time off would adversely affect the functioning of the unit. On many occasions, when Petitioners' requests to use accrued compensatory time were denied, they were told by their supervisors that the reason for the denial was because the Department would be required to replace them with off-duty officers who would have to be paid overtime. Thus the reason for the denial was because the City would have to pay replacement officers who were available and willing to work the overtime rate of pay.

The City enforces a "Location When Ill" (LWI) policy which regulates the off-duty activities of employees on leave for illness or on-the-job injuries. The LWI policy provides that during the time period in question, that "[a] member reporting sick or injured shall be confined to his or her residence, clinic, or hospital, except to visit his or her personal physician or by permission of his or her

supervisor."[1] Under this policy, employees using sick leave or on-the-job injury leave were confined to their residences 24 hours per day during each day on which leave was to be used and on weekend days which abutted those days. Petitioners, therefore, could not engage in any personal activity outside their home during the entire 24-hour period, even when they were physically incapable of performing rigorous police officer duties, but were capable of performing less strenuous activities such as grocery shopping, attending church services, etc. The City enforced this confinement policy with in-person and telephone checks every third day on the homes of those using sick or on-the-job injury leave.

II. Proceedings Below.

The District Court dismissed two of Petitioners' claims on summary judgment and entered final judgment in

[1] The LWI Policy is contained in Rule DR 1104 of the City's Police Department Regulations. After the commencement of this litigation, the City amended this rule to provide that it applies only during scheduled duty hours.

Favor of the City on three other claims.[2] In particular, the District Court granted the City's motion for summary judgment on Petitioners' claims that certain aspects of the City's sick leave policy violate the FLSA and that the Act requires the City to compensate canine officers for the time they spend commuting to work with their dogs. Next, following a pretrial conference, the parties submitted the remaining claims to the District Court for a decision based on trial memoranda, stipulations, and exhibits. The District Court eventually found in favor of the City on these claims as well.

On September 7, 1999, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's judgments, holding that (1) the City's policy of not allowing police officers to take compensatory time off when a department supervisor decided that enough officers had

[2] The claim regarding compensation for time spent on caring for canines was resolved through a compromise reached between the parties.

already signed up to be off on a particular day such that the department could not effectively function with any more people off did not violate the FLSA; (2) canine officers were not entitled to be compensated for canine commute time; (3) police officers were not entitled to compensation for time spent on cleaning and scheduled maintenance of police vehicles used by officers for commuting or for commute time in such vehicles; (4) the City's "Location When Ill" policy, which required officers to remain at home when on paid leave for illness or on-the-job injury unless they received permission to leave, did not violate the FLSA by failing to compensate officers on a 24-hour per day basis while they were confined at home; and (5) police captains were exempt from FLSA overtime requirements as salaried employees. This petition addresses the Sixth Circuit Court's holding regarding the first and fourth issues identified above.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED WITH REGARD TO COMPENSATORY TIME BECAUSE THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT, ESPECIALLY IN LIGHT OF THE COURT'S DECISION TO ACCEPT REVIEW IN *CHRISTENSEN V. HARRIS COUNTY.*

In this case, as recognized by the dissenting opinion, the Sixth Circuit failed to determine that the City's policy of denying Petitioners' requests for compensatory time off if the request would require the Department to bring in a replacement officer at the overtime rate of pay is in direct violation of the FLSA and its implementing regulations. The governing statute, 29 U.S.C. §207(o)(5)(B), provides that an officer may take compensatory time off if two conditions precedent are satisfied: (1) that the employee must be permitted to use compensatory time off within a reasonable period after making the request; and (2) the use of the

compensatory time must not unduly disrupt the operations of the Department.

In order to determine whether Petitioners' requests satisfied the first condition precedent, it is necessary to examine the meaning of the term "reasonable period." One of the governing Department of Labor regulations provides that if there is an agreement governing the conditions under which an employee can take compensatory time off, "the terms of such agreement or understanding will govern the meaning of 'reasonable period.'" 29 C.F.R. §553.25(c)(2). Although the parties entered into a Memorandum of Understanding, it does not define the term reasonable period. However, this term is defined by Department of Labor regulation 29 C.F.R. §553.25(c)(1), as follows:

> (c) Reasonable Period. (1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the

> normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff. 29 C.F.R. §553.25(c)(1).

With regard to the second condition precedent, the term "unduly disrupt" is also defined by a Department of Labor regulation as follows:

> (d) Unduly Disrupt. When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (*See* H. Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services. 29 C.F.R. §553.25(d).

At the trial court and on appeal, Petitioners argued that paying overtime wages to a replacement officer so that another can use banked compensatory time is not undue

disruption. Accordingly, Petitioners contended that the City's policy of closing the log books at the point at which overtime would have to be paid and not at the point of undue disruption constitutes a policy that violates the FLSA. This position is supported by *Heaton v. Moore,* 43 F.3d 1176, 1181 (8th Cir. 1994) (holding that "the eventual payment of overtime compensation cannot be deemed 'unduly disruptive.'"). Department of Labor commentary on the application of the FLSA provides further support:

> The Department recognizes that situations may arise in which overtime may be required of one employee to permit another employee to use compensatory time off. However, such a situation, in and of itself, would not be sufficient for an employer to claim that it is unduly disruptive.
> Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed.Reg. 2012, 2017 (1987).

In this case, the majority opinion found that the parties had an agreement on the issue of compensatory time which provided for the conditions under which an employee

can use compensatory time off. *Aiken,* 190 F.3d at 757. The conditions provided for included that the precinct supervisor could close the log book once a certain number of officers requested a specific day off. On this basis, the Court found that there was an agreement between the City and Petitioners that the "reasonable period" for requesting the use of banked compensatory time begins thirty days prior to the date in question and ends when the log book is closed. *Id.* The court, which recognized that it was having difficulty reconciling 29 C.F.R. §553.25(c)(2) and 29 C.F.R. §553.25(d), then concluded that it would not interfere with the agreement reached between the parties. Accordingly, the court found that the City's policy did not violate the FLSA because the Petitioners' requests, which were submitted after the log book was closed, were not submitted in a reasonable period as defined in their agreement. *Id.*

The dissenting opinion chastises the District Court for "failing to come to grips" with Petitioners' argument that the

City's compensatory time policy violated the FLSA. *Aiken,* 190 F.3d at 764. As Judge Ryan succinctly observes:

> Instead of resolving this difficult, mixed question of fact and law, the district court merely held, as the majority opinion in this court does, that the entire issue is governed by the collective bargaining agreement between the parties, and the collective bargaining agreement has a provision as to the reasonable period within which time off may be requested. The district court's reasoning, although to me rather abstruse, apparently is that if an officer doesn't make a request for comp time early enough to assure that his replacement need not be paid time-and-a-half, then the officer will not have requested his time off within a reasonable period. The problem, of course, with that sort of reasoning is that in conflates the concept of the reasonable period within which the day off must be requested, and whether it is an undue disruption of the police department's operations to permit the time off to be taken. Thus, the plaintiffs' claim that the logbook is being declared full for a forbidden reason is never directly addressed. . . . The majority opinion likewise dodges the problem[.] . . .*Id.*

As further recognized by the dissenting opinion, the question of whether an employer's denial of a request for compensatory time off on the basis that the employer will

have to pay overtime wages to the replacement employee violates the FLSA has not been addressed by either the District Court or the Court of Appeals. Thus, in reaching their decisions, both Courts have departed from the usual course of judicial proceeding by failing to apply governing law and have reached a decision that conflicts with relevant federal statutory and regulatory law. Moreover, in this case, the majority had "some difficulty" in reconciling the provisions of 29 C.F.R. §553.25(c)(2), which provides that the meaning of "reasonable period" will be governed by the terms of any agreement between the employer and employee on the use of compensatory time, with 29 C.F.R. §553.25(d), which defines the expression "unduly disrupt." *Aiken,* 190 F.3d at 757 n.2.

Thus, the issue of whether an employer may deny an employee's request to use compensatory time off on the basis that it was not requested within a reasonable period as defined by the regulations and would require the employer to

pay overtime wages to the replacement employee is unsettled and should be decided by this Court.

This is especially true given the Court's decision to grant a petition for *writ of certiorari* in *Christensen v. Harris County,* 120 S.Ct. 320 (Oct. 12, 1999), limited to the question of whether a public agency governed by the provisions of the FLSA may, absent a pre-existing agreement, require its employees to use accrued compensatory time. When deciding this issue, the Court will most likely consider whether the employer can force its employees to use accrued compensatory time because it wants to avoid paying overtime wages in cash. Under these circumstances, although the facts are slightly different, the opinion reached in *Christensen* will likely have an impact on the *Aiken* Petitioners because the Court will be considering what impact an employer's desire to avoid paying overtime wages has upon its obligations under the compensatory time provisions of the FLSA.

II. THE PETITION SHOULD BE GRANTED WITH REGARD TO THE "LOCATION WHEN ILL" POLICY BECAUSE THE SIXTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The City adopted a leave policy which required police officers to remain at home when on paid leave for illness or on-the-job injury. Here, the Sixth Circuit found that the City's failure to compensate officers for all waking hours they were confined at home under the City's leave policy did not violate the FLSA which requires an employer to compensate employees for time spent predominately for the employer's benefit. The Court found the question to be analogous to the question posed by cases considering the compensability of "on-call" time. *Aiken,* 190 F.3d at 760. For purposes of the FLSA, the Court held that the employee's free time must be severely restricted for off-time to be construed as work time. The Court found that the City's

policy was not so onerous as to prevent employees from effectively using time for personal pursuits, and did not transform recovery time into work. At home, officers were free to use their time as they pleased. Accordingly, the Sixth Circuit affirmed the District Court's dismissal of this claim.

It is Petitioners' contention that different standards apply to cases involving the compensability of time spent at home while subject to "location when ill" policies as opposed to those involving standby or on-call policies. Because of the differences between staying at home while on sick leave where you are not subject to call to return to work, and being on call where you may be requested to return to work, the tests established in measuring the impact of restrictions imposed on employees subject to standby or on-call policies do not perform as well in measuring the impact of restrictions imposed on employees subject to a "location when ill" policy that confines the employee to his or her home.

In reaching its decision on the basis of the on-call standard, the Sixth Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court. Specifically, the Court's decision is contrary to two seminal United States Supreme Court cases, *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 151, 89 L.Ed. 124 (1944) and *Armour & Co. v. Wantock*, 323 U.S. 126, 133, 65 S.Ct. 165, 89 L.Ed. 118 (1944), which hold that time spent not engaged in actual work activities could be considered "hours worked" under the FLSA. By failing to follow the existing standards with regard to compensability for time spent not engaged in actual work activities established by these decisions, the Sixth Circuit has rendered a decision that is contrary to the standards established by this Court.

In addition, a Department of Labor regulation recognizes that "[t]ime spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal

pursuits." 29 C.F.R. 553.221(d). As recognized by this Court in *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), deference must be given to the Secretary of Labor's interpretation of the FLSA. Accordingly, time spent at home on call may be compensable under certain circumstances.

Moreover, unlike on-call cases, the question of whether an employee should be compensated for time spent while subject to location when ill has not been decided by this Court. Accordingly, the petition should be granted on the grounds that the Sixth Circuit opinion conflicts with relevant decisions of this Court and because this Court can settle this important federal question.

CONCLUSION

This case presents two issues of significant importance. First, this Court must settle the law regarding whether an employer, who seeks to avoid paying overtime wages to a replacement employee, may refuse to grant an

employee's request to use compensatory time on the basis that the request was not submitted within a reasonable period when the agreement between the parties does not specifically define the term reasonable period and when the employer's operations will not be unduly disrupted if the request is granted. Second, in seeming contradiction to this Court's decisions in *Skidmore* and *Armour*, the Sixth Circuit in this case has relied upon the test established in on-call cases to determine whether an employer is in violation for failing to pay overtime wages to an employee confined at home under a location while ill policy. The failure of the Court to apply the general principles set forth in *Skidmore* and *Armour* and the failure of the Court to accord deference to the Department of Labor's regulations is contrary to relevant decisions of this Court. For these reasons, the petition for *writ of certiorari* should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM RUSSELL AIKEN, et al
Petitioner(s)

v.

CITY OF MEMPHIS, TENNESSEE
Respondent

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Sixth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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William Russell AIKEN, et al., Plaintiffs-Appellants,

v.

CITY OF MEMPHIS, Tennessee, Defendant-Appellee.

No. 97-6371.

United States Court of Appeals,
Sixth Circuit.

Argued Dec. 18, 1998.
Decided Sept. 7, 1999.

Affirmed.

Ryan, Circuit Judge, filed opinion concurring in part and dissenting in part.

William B. Aitchison (argued), Aitchison & Vick, Portland, Oregon, Edwin Dean White III (briefed), Farris, Mathews, Branan & Hellen, Memphis, Tennessee, for Appellants.

Louis P. Britt III (argued and briefed), McKnight, Hudson, Ford & Harrison, Memphis, Tennessee, for Appellee.

Before: MARTIN, Chief Judge; RYAN and COLE, Circuit Judges.

COLE, J., delivered the opinion of the court, in which MARTIN, C. J., joined. RYAN, J. (pp. 762-65), delivered a separate opinion concurring in part and dissenting in part.

COLE, Circuit Judge.

Plaintiffs, past and present Memphis police officers, brought an action against the city of Memphis asserting various claims under the Fair Labor Standards Act (FLSA or Act), 29 U.S.C. §§ 201 et seq. Plaintiffs currently appeal the district court's dismissal of two of those claims on summary judgment and the court's final judgment in favor of the city on three other claims. For the following reasons, we AFFIRM the judgments of the district court.

I.

Plaintiffs filed this action on January 7, 1993. During the course of the litigation, plaintiffs alleged, among other things: that certain aspects of the city's sick leave policy violate the FLSA; that the Act requires the city to compensate canine officers for the time they spend commuting to work with their assigned dogs; that aspects of the city's policy

regarding the use of compensatory time violate the FLSA; that police captains are not exempt from FLSA overtime requirements; and that officers are entitled under the Act to compensation for time spent maintaining and commuting to work in city vehicles. The district court granted the defendant's motion for summary judgment on plaintiffs' first two claims. Following a pretrial conference, the parties submitted the remaining claims to the district court for a decision based on trial memoranda, stipulations, and exhibits. The district court eventually found in favor of the city on these claims as well. This timely appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a district court's grant of summary judgment. See Hartsel v. Keys, 87 F.3d 795, 799 (6th Cir.1996). We affirm "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When

evaluating an appeal, this Court views the evidence in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

On the issues that the district court ruled on at trial, we review the district court's conclusions of law de novo. See Doe v. Claiborne County, 103 F.3d 495, 505 (6th Cir.1996). We review its findings of fact for clear error. See United States v. Martin, 95 F.3d 406, 408 (6th Cir.1996).

III. DISCUSSION

III.A Compensatory Time

Plaintiffs contend that the district court erred by ruling that the city's policy regarding the use of compensatory time does not violate the FLSA. Pursuant to memoranda of understanding between the city and the plaintiffs' union, officers who work overtime may choose between receiving overtime pay or compensatory time. Officers can accumulate up to 480 hours of compensatory time. The memoranda dictate that an officer wishing to use accrued compensatory time must

sign his or her precinct's compensatory time log book any time within thirty days of the requested day off. However, the city also requires that the commanding officer of each precinct monitor its log book to ensure that each shift is adequately staffed. If the commanding officer determines that further requests for time off would adversely affect the functioning of the unit, based on the circumstances of the case, he or she will not allow more officers to sign up to use compensatory time on that particular day.

The plaintiffs argue that this practice of closing a precinct's log books violates the FLSA. The Act allows public agencies to provide, in lieu of overtime, "compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section." 29 U.S.C. § 207(o)(1). The Act imposes several conditions on a public agency's ability to offer compensatory time, however. Two are relevant for the purposes of this case. First, an employer may grant compensatory time in lieu of overtime pay pursuant only to a

collective bargaining agreement, or other agreement. See 29 U.S.C. § 207(o)(2)(A). Second, an employee "shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. § 207(o)(5).

The plaintiffs' argument focuses on the phrase "unduly disrupt" in § 207(o) (5). They begin by arguing that § 207(o)(5) requires an employer to grant an employee's reasonably timed request for the use of banked compensatory time, unless the use of the time would be unduly disruptive. See 29 C.F.R. § 553.25(d) ("For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of an acceptable quality and quantity for the public during the time requested without the employee's services."); S.Rep. No. 99-159 (1985) ("By unduly disruptive, the Committee means something more than mere

inconvenience."). The city, however, acknowledges its policy is not to grant overtime pay to one officer so that another can use compensatory time on a requested date. Plaintiffs contend that the payment of overtime to an officer so that another can use banked compensatory time is not an undue disruption. See Heaton v. Moore, 43 F.3d 1176, 1181 (8th Cir.1994) ("Moreover, the eventual payment of overtime compensation cannot be deemed 'unduly disruptive.' "); 52 Fed.Reg. 11,2017 (1987) ("The Department recognizes that situations may arise in which overtime pay may be required of one employee to permit another employee to use the compensatory time off. However, such a situation, in and of itself, would not be sufficient for an employer to claim that it is unduly disruptive."). Plaintiffs conclude, therefore, that the city violates the Act by shutting the logbooks not at the point of undue disruption, but rather at the point at which a precinct would begin having to pay replacement officers on an overtime basis.

The fundamental defect in the plaintiffs' position, however, is that it completely ignores the phrase "reasonable period," which the Act gives the parties the freedom to define. See Moreau v. Harris County, 158 F.3d 241, 246-47 (5th Cir.1998); see also 29 C.F.R. § 553.23(a)(1) (providing that agreements between employers and employees with regard to compensatory time are valid as long as they are not in conflict with the FLSA itself). Title 29 C.F.R. § 553.25(c)(2), specifically provides that:

> The use of compensatory time in lieu of cash payment for overtime must be pursuant to some form of agreement or understanding between the employer and the employee (or the representative of the employee) reached prior to the performance of the work. (See § 553.23.)[1] To the extent that the conditions

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[1] Title 29 C.F.R. s 553.23 provides, in its relevant sections:
(a) General.
(1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7(o)(2)(A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees....
(2).The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act....

> under which an employee can take compensatory time off are contained in an agreement or understanding as defined in § 553.23, the terms of such agreement or understanding will govern the meaning of "reasonable period."

(emphasis added). Furthermore, in the comments to the final version of 29 C.F.R. § 553.25, the Department of Labor stated that:

> The Department believes ... that some parties may choose to include in their agreement or understanding the conditions or terms regarding the taking of compensatory time off. No useful purpose would be served, in the Department's view, by providing for some further review under the FLSA of the appropriateness of the agreed upon terms.

52 Fed.Reg. 11,2017 (1987); see also Auer v. Robbins, 519 U.S. 452, 117 S.Ct. 905, 911, 137 L.Ed.2d 79

(b) Agreement or understanding between the public agency and a representative of the employees.
(1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement.

(1997) (Secretary of Labor's interpretation of own regulations is controlling unless plainly erroneous).[2]

In this case, the city and the plaintiffs' union had an agreement on the issue of compensatory time. The agreement provided "the conditions under which an employee can take compensatory time off." 29 C.F.R. § 553.25. These include a condition that once a certain number of officers requested a specific day off, the commanding officer may close the precinct's log book for that day. The city and the union in this case have agreed, then, that the reasonable period for requesting the use of banked compensatory time begins thirty days prior to the date in question and ends when the number of officers requesting the use of compensatory time on the given

[2] We acknowledge some difficulty reconciling 29 C.F.R. § 553.25(c)(2) and 29 C.F.R. § 553.25(d). The Seventh Circuit, however, has recently noted the importance of private ordering in FLSA cases, even in situations in which the FLSA has not granted parties the broad freedom to contract that it has here. See Dinges v. Sacred Heart St. Mary's Hospitals, Inc., 164 F.3d 1056, 1059 (7th Cir.1999) ("[W]e must take account of the arrangement plaintiffs themselves chose.... Although the FLSA overrides contracts, in close cases it makes sense to let private arrangements endure--for the less flexible statutory approach has the potential to make everyone worse off."). We agree.

date would bring the precinct's staffing levels to the minimum level necessary for efficient operation. We are loath to interfere with this agreement. Therefore, we conclude that the district court did not err by finding for the city on this claim.

III.B Canine Commute Time

Plaintiffs also contend that the district court erred by granting summary judgment in favor of the city on plaintiffs' claim for compensation for canine commute time. Memphis maintains a "Canine Squad," of which some plaintiffs are members. The city assigns each member of the squad a dog and a vehicle to transport the animal. The city also requires that members board the dogs at their homes and that they feed, train, walk, and clean up after their four-legged partners. The parties have settled most of the issues relating to compensation for time officers spend caring for dogs while not on duty. However, as the dogs reside in squad members' homes, the city also requires each canine officer to drive his or her dog to work in the vehicles that the city provides. Plaintiffs contend that squad members spend a significant amount of time during

their commutes "feeding, training, walking, and cleaning up after the dog[s]." Nevertheless, the city does not compensate officers for either their entire commuting time or for the time during the commute that they spend caring for dogs. Plaintiffs contend that this policy violates the Act. We disagree.

"The Portal-to-Portal Act, which amended the FLSA in 1947, 29 U.S.C. § 521 et seq., represented an attempt by Congress to delineate certain activities which did not constitute work," and which are therefore non- compensable. See Reich v. New York City Transit Auth., 45 F.3d 646, 649 (2nd Cir.1995). "[W]alking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" is one example of a non-compensable activity. 29 U.S.C. § 254(a)(1). Similarly, employees are not entitled to compensation under the Act for "activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or

subsequent to the time on any particular workday at which he ceases, such principal activity." 29 U.S.C. § 254(a)(2). The effect of these sections is to make ordinary commute time non-compensable under the FLSA.

Despite these provisions, an employee is entitled to payment for any work that the employer requires the employee to perform during the commute. See 29 C.F.R. § 785.41. Several courts recently have addressed the issue of the compensability of canine care that occurs during commutes; the leading case is Reich. "Feeding, training, and walking [a police dog] are work" and are therefore compensable activities. Reich, 45 F.3d at 651. It follows, then, that to the extent that "[s]uch true dog-care work occurr[s] during the commute [it] is not exempted from compensation by the Portal-to-Portal Act." Id. at 652.

Plaintiffs, however, have not adduced evidence that canine officers spend more than a de minimis amount of time during their commutes engaged in such activities. See Reich, 45 F.3d at 652-53; see also Bobo v. United States, 136 F.3d

1465, 1468 (1998); Andrews v. DuBois, 888 F.Supp. 213, 219 (D.Mass.1995); Levering v. District of Columbia, 869 F.Supp. 24, 29-30 (D.D.C.1994). "When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or the Fair Labor Standards Act." See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 692, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946); see also United States Dep't of Labor v. Cole Enterprises, Inc., 62 F.3d 775, 780 (6th Cir.1995). Plaintiffs' affidavits demonstrate only that officers must "occasionally stop to feed the dog, let him out of the car or clean up after him while traveling to work." Although plaintiffs' affidavits also indicate that officers must "constantly" and "on a regular basis" discipline their dogs, such generalities do not create a question of fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (holding that a mere scintilla of evidence in support of the nonmoving party's position is

insufficient to survive a motion for summary judgment). Even if we were inclined to conclude, which we are not, that this "evidence" indicates that, over the course of a commute, the seconds that it takes to discipline a dog--even on a regular basis--could add up to a significant amount of time, we are at a loss as to how Memphis could be expected to document such time. See Lindow v. United States, 738 F.2d 1057, 1062-63 (9th Cir.1984) (setting forth factors relevant to the de minimis doctrine, including size of the aggregate claim and practical difficulty of recording the time).

III.C Vehicle Maintenance & Non-Canine Commute Time

The plaintiffs also contend that the district court erred by ruling in favor of the city with regard to other commuting issues. The city provides some officers vehicles for use in commuting to and from work. If an officer is assigned a take-home vehicle, the officer must schedule maintenance for the vehicle, must keep the vehicle's radio on during the commute, and must respond to disabled vehicles or crimes that the officer observes during the commute. Plaintiffs sought

compensation for the time they spend cleaning and scheduling maintenance for their city vehicles, and for the time spent commuting to work in them.

On the cleaning and maintenance issue, plaintiffs claims are without merit. The FLSA provides that:

> [T]he use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

29 U.S.C. § 254(a) (emphasis added). Plaintiffs do not argue that officers' use of police vehicles for commuting purposes takes officers outside of their normal commuting areas or that there is no agreement between the city and the officers' union covering these matters. Keeping vehicles clean and scheduling maintenance to be done at the city's expense are hardly arduous and precisely the sort of activities that Congress had in mind when it used the phrase "incidental to the use of [the

employer's] vehicle." Id. The legislative history of the 1996 amendments is instructive: "It is not possible to define in all circumstances what specific tasks and activities would be considered 'incidental' to the use of an employer's vehicle for commuting.... [R]outine vehicle safety inspections or other minor tasks have long been considered preliminary or postliminary activities and are therefore not compensable." H.R. Rep. 104-585.

On the issue of compensation for the entire commute, we likewise find that the district court did not err; monitoring a police radio does not convert commute time into compensable work. Cf. Bartholomew v. Burlington, 5 F.Supp.2d 1161, 1170 (D.Kan.1998) (employer requirement that out-going officer brief in-coming officer during commute does not change nature of travel time). Plaintiffs contend that they should be compensated because they must respond to emergencies that they observe while driving to work or that are communicated by radio dispatch. They also contend that

they should be compensated because the presence of marked police vehicles on the city's streets deters crime.

Plaintiffs are incorrect. As an initial matter, if an officer takes time out of his or her commute to respond to an incident, he or she is compensated if the response takes more than thirty minutes.[3] Second, although the presence of marked police cars on the streets arguably deters crime, this is irrelevant for FLSA purposes. See Hellmers v. Vestal, 969 F.Supp. 837, 843 (N.D.N.Y.1997) ("Nowhere in the [FLSA] does there appear to be an exemption for commuting time spent in marked police cars."); H.R. Rep. 104-585 ("The fact that a vehicle may been modified for special purposes, displays company logos, or is specially equipped does not alter the nature of such travel."). Finally, the amount of work

[3] The city apparently takes the position that shorter stops are de minimis. Plaintiffs note that shorter stops are not compensated, but do not argue that the city's threshold length of time for compensability is too high, choosing instead to argue that all commuting time is compensable.

involved in monitoring a police radio during a commute is simply de minimis.[4] Again, the district court did not err.

III.D. Location-When-Ill Policy

The plaintiffs contend that the district court erred in granting summary judgment on the issue of whether the city's Location-When-Ill (LWI) policy, DR 1104, violates the FLSA. The department pays employees on leave for illness or an on-the-job injury at their normal hourly rate for their regular shifts. The department's LWI policy, however, regulates the activities of employees who are on leave. It provided, during the time period in question,[5] that "[a] member reporting sick or injured shall be confined to his or

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[4] This case is distinguishable from those that have held that a requirement that employees monitor a noisy radio converts on-call time to work. See, e.g., Cross v. Arkansas Forestry Comm'n, 938 F.2d 912, 916- 17 (8th Cir.1991). In those cases, the key is whether monitoring the device, even where it is portable, prevents employees from using their free time as they wish. For example, a squawking radio would hardly be welcome in church, the library, or the movies; it would effectively prevent the employee from engaging in any pursuit in a location that demands quiet. Here, however, the question is whether the employer requires the employee to perform a significant amount of work during the commute. Under the facts of this case, we conclude that the answer is no.

[5] After the commencement of this litigation, the city "clarified" the LWI policy. It now provides that it applies only "during his or her scheduled duty hours."

her residence, clinic, or hospital, except to visit his or her personal physician or by permission of his or her supervisor."[6] The policy thus placed no restrictions on an officer's activities while at home, but if an officer left home without permission, he or she was subject to discipline. The record indicates that the city enforced the policy with checks by supervisors every third day. The department made checks "at all hours." It conducted them by phone, but if there was no response, the city sent someone to the officer's residence.

Plaintiffs claim, however, that the LWI policy was so onerous and intrusive that any waking hour spent under it counts as an hour worked for the purposes of the FLSA. Therefore, plaintiffs claim that they are entitled to overtime compensation for "non-sleeping time spent outside of their regular workshifts under the structures of DR 1104."

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[6] The reason for this policy was, as the defendant puts it, to dissuade officers from "the inappropriate practice of using 'sick' days as additional vacation days."

Generally speaking, the FLSA requires employers to compensate an employee at a rate of pay not less than one and one-half times the employee's normal rate of pay for hours the employee works above the statute's applicable maximum workweek. See 29 U.S.C. § 207(a). Under certain circumstances, employer restrictions on what is ostensibly an employee's free time can cause such time to count as hours worked. See 29 C.F.R. § 553.221(c), (d). The question confronting this Court is analogous to that posed by cases considering the compensability of "on-call" time.[7] An employer must compensate an employee for time spent "predominantly for the employer's benefit." Martin v. Ohio Turnpike Comm'n, 968 F.2d 606, 609 (6th Cir.1992) (citing Armour & Co. v. Wantock, 323 U.S. 126, 133, 65 S.Ct. 165, 89 L.Ed. 118 (1944)); see also 29 C.F.R. § 553.221(c), (d). In other words, the question in on-call cases is whether the

[7] An on-call employee leaves the employer's premises "with the understanding that he or she is expected to return to work" if called in. 29 C.F.R. § 553.221.

employer's restrictions on officers' time "prevent the employees from effectively using the time for personal pursuits." Martin, 968 F.2d at 611. "That some of the plaintiffs' personal activities may have been affected is not enough." Id. In making this determination, the Court examines "all the circumstances of the case." Id. at 609 (internal quotes omitted). "[A]n employee's free time must be severely restricted for off-time to be construed as work time for purposes of the FLSA." See Dade County v. Alvarez, 124 F.3d 1380, 1384 (11th Cir.1997) (internal quotes omitted), cert. denied, --- U.S. ----, 118 S.Ct. 1804, 140 L.Ed.2d 943 (1998).

Using this fact-specific standard as a guide, it is clear that time Memphis officers spend subject to the city's LWI policy is not compensable work.[8] At home, such officers are

[8] An initial, and obvious, difference between this an on-call cases in which courts have held employee time compensable is that an officer on LWI leave is presumed to be too ill or injured to work. Therefore a Memphis officer on leave does not have to contend with the possibility of being called in by the department.

free to use their time as they please. Although they must receive permission before leaving home--assuming of course that the officer is well enough to leave home--there is no evidence in the record to indicate that Memphis ever, let alone routinely, denied permission. Thus, we conclude that Memphis's insignificant phone-in burden does not transform recovery time into work, as it is not "so onerous as to prevent employees from effectively using the time for personal pursuits." Martin, 968 F.2d at 611. Indeed, the relatively few cases that have held on-call time compensable involved a significantly greater intrusion on employees than exists in this case. See, e.g., Bright v. Houston Northwest Medical Center Survivor, Inc., 934 F.2d 671, 678-79 (5th Cir.1991) (employee on call 24 hours a day, 365 days a year, must always be sober and within 20 minutes of work); Cross v. Arkansas Forestry Comm'n, 938 F.2d 912, 916-17 (8th Cir.1991) (employees required to monitor noisy hand-held radio 24 hours per day, forcing them to concentrate on radio all day and preventing them from going anywhere noise would be unwelcome); see

also Berry v. County of Sonoma, 30 F.3d 1174, 1183 (9th Cir.1994) (listing as one of the "illustrative, non-exhaustive" list of factors that a court should consider in determining whether an employee is free to engage in personal activities "whether there were excessive geographical restrictions on employee's movements"). The district court was correct to dismiss this claim.

III.E. Exempt Status of Captains

Finally, plaintiffs contend that the district court erred by ruling in favor of the city on plaintiffs' claim regarding police captains. Memphis does not pay overtime to captains because it classifies them as salaried, executive employees. The FLSA does not require employers to provide overtime pay to "bona fide executives." 29 U.S.C. § 213(a)(1). The regulations implementing the FLSA provide that for an employee to fall within this exemption, that employee must be paid on a "salary basis." 29 C.F.R. § 541.1(f). An employee is so paid "if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a

predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118.

The plaintiffs contend that the police captains are not bona fide executives for the purposes of the FLSA because they were subject to pay reductions for disciplinary infractions relating to the "quality or quantity" of their work. The City of Memphis Civil Service Rules[9] provide that if a Memphis employee commits a violation of the rules, the employee is subject to several disciplinary actions, including "unpaid suspension of a duration as short as one day." Although these rules theoretically apply to all Memphis employees, there is no rule that specifically provides that police captains are subject to suspensions. Only one captain--not a plaintiff in this case--has ever been suspended without pay for disciplinary reasons.

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[9] "Penalties imposed for safety rules of major significance will not affect the employee's salaried status." 29 C.F.R. § 541.118(a)(5). Defendant apparently concedes that some of the rules in question are not "safety rules of major significance."

In Auer v. Robbins, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), a case with facts virtually identical to those in the case before us, the Supreme Court considered whether "an employee's pay is 'subject to' disciplinary or other deductions whenever there exists a theoretical possibility of such deductions, or rather only when there is something more to suggest that the employee is actually vulnerable to having his pay reduced." Id. at 459, 117 S.Ct. 905. The Auer plaintiffs, several sergeants and a lieutenant, along with all other St. Louis police department employees, were nominally covered by a police manual that listed 58 possible rules violations and also listed several possible penalties associated with each, including, in some instances, deductions in pay. The Court held that the plaintiffs were nevertheless salaried employees under the salary-basis test. Deferring to the Secretary of Labor's interpretation of the FLSA, the Court wrote that employees are denied exempt status under the test only when "employees are covered by a policy that permits disciplinary or other deductions in pay 'as a practical matter.'

" Id. at 461, 117 S.Ct. 905 (emphasis added). This is so when the employer has either (1) "an actual practice of making such deductions," or (2) "an employment policy that creates a significant likelihood of such deductions." Id. (internal quotations omitted). A "one-time deduction in a sergeant's pay, under unusual circumstances," was not sufficient to establish the former. Id. at 462, 117 S.Ct. 905. A manual that applied to all department employees, and thus that did not "effectively communicate that pay deductions are an anticipated form of punishment for employees in petitioners' category," did not establish the latter. Id. The Court concluded that Its holding was the most sensible, since it "avoids the imposition of massive and unanticipated overtime liability (including the possibility of substantial liquidated damages) in situations in which a vague or broadly worded policy is nominally applicable to a whole range of employees but is not 'significantly likely' to be invoked against salaried employees." Id. at 461, 117 S.Ct. 905.

In this case, there is nothing to indicate that Memphis police captains are anything other than salaried employees.[10] They may be theoretically subject to pay reductions, but as a "practical matter" they are not. The evidence shows that only one captain ever faced a deduction in pay. Thus, plaintiffs cannot demonstrate an actual practice of applying such deductions to captains. By plaintiffs' own admission, the Civil Service rules apply to all department employees. Thus, the policy does not effectively communicate that captains will be suspended in any specified circumstance. Again, we conclude that the district court did not err.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgments of the district court.

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[10] On facts virtually identical to the ones here, several courts have followed Auer. See, e.g., West v. Anne Arundel County, 137 F.3d 752, 762-63 (4th Cir.1998); Childers v. City of Eugene, 120 F.3d 944, 947 (9th Cir.1997); Stanley v. City of Tracy, 120 F.3d 179, 183-84 (9th Cir.1997); Ahern v. County of Nassau, 118 F.3d 118, 121 (2nd Cir.1997); Carpenter v. City of Denver, 115 F.3d 765, 767 (10th Cir.1997); Balgowan v. New Jersey, 115 F.3d 214, 219 (3d Cir.1997); DiGiore v. Ryan, 987 F.Supp. 1045, 1052 (N.D.Ill.1997).

CONCURRING/DISSENTING OPINION

RYAN, Circuit Judge, concurring in part and dissenting in part.

In my view, neither the district court nor the majority here come squarely to grips with the plaintiffs' claim that they are, on some occasions, being denied compensatory time off for reasons forbidden under the Fair Labor Standards Act and its implementing regulations. The result, in my judgment, is that the plaintiffs continue to be denied relief to which they are entitled.

The parties agree that 29 U.S.C. § 207(o)(5)(B) assures that, in this case, an officer

> shall be permitted by the employee's employer to use [comp] time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

Thus, under this subsection there are two conditions precedent that must be satisfied before an employee may take comp time off: (1) the employee must be permitted to take the comp time within a reasonable period of time after making his

request; and (2) taking the comp time must not unduly disrupt the operations of the Memphis Police Department.

One of the implementing regulations adopted by the Department of Labor provides that

> [t]o the extent that the conditions under which an employee can take compensatory time off are contained in an agreement or understanding ... the terms of such agreement or understanding will govern the meaning of "reasonable period."

29 C.F.R. § 553.25(c)(2).

The parties agree that there is a collective bargaining agreement in place between them. Unfortunately, the agreement, the foregoing agency regulation notwithstanding, does not define the term reasonable period. However, a Department of Labor regulation does define reasonable period as follows:

> (c) Reasonable Period. (1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak

> workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff.

29 C.F.R. § 553.25(c)(1).

The regulation also defines the expression unduly disrupt as follows:

> (d) Unduly Disrupt. When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

29 C.F.R. § 553.25(d).

The plaintiffs concede that the defendant's precinct commanders may properly reserve to themselves the authority to determine when the logbooks are "full," so that the "manning" in the precinct will not fall below necessary levels

and thus unduly disrupt the operation of the police department. The plaintiffs insist, however, that the precinct commanders are declaring the logbook full, not when there is a risk of manpower falling below what is necessary for the public safety, but rather when the number of officers requesting comp time off reaches the point that it will be necessary to pay their replacement officers at the overtime rate of pay. That excuse for declaring the logbook full, the plaintiffs argue, is not permitted under the FLSA, or the Labor Department regulations, or the collective bargaining agreement between the parties, because paying a replacement officer at the overtime rate does not unduly disrupt the operation of the police department as that term is defined in 29 C.F.R. § 553.25(d) and has nothing whatever to do with the "reasonable period" within which the comp time may be used following a request for it. In addition, the plaintiffs point to Department of Labor commentary on the application of the FLSA which provides: The Department [of Labor] recognizes that situations may arise in which overtime may be required of one

employee to permit another employee to use compensatory time off. However, such a situation, in and of itself, would not be sufficient for an employer to claim that it is unduly disruptive.

Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52, Fed.Reg.2012, 2017 (1987).

To the same effect, argue the plaintiffs, is an Eighth Circuit decision in Heaton v. Moore, 43 F.3d 1176, 1181 (8th Cir.1994), which holds that the fact that an employer must pay an employee overtime compensation in order to permit another employee to use accrued compensatory time off, does not, of itself, constitute an undue disruption allowing the employer to deny the request.

The defendant acknowledges that it has a policy of not permitting comp time to be taken if it would require the department to bring in a replacement officer at the overtime rate of pay. Plaintiffs claim that more often than not it is the application of this policy, forbidden by the federal regulations,

that the precinct commanders employ to declare the logbooks full.

The district court failed to come to grips with this argument, stating only that "the City could have allowed the officer the time off by paying another officer overtime compensation to work in the requesting officer's place [,but] [a]s general policy, the Division declined to call in officers on an overtime basis in order to permit another officer off for compensatory time." Aiken v. City of Memphis, 985 F.Supp. 740, 745 (W.D.Tenn.1997). The district court then observed that a denial of compensatory time off for that reason "only occurred occasionally and was not routine." Id. The plaintiffs claim it occurs all the time.

Instead of resolving this difficult, mixed question of fact and law, the district court merely held, as the majority opinion in this court does, that the entire issue is governed by the collective bargaining agreement between the parties, and the collective bargaining agreement has a provision as to the reasonable period within which time off may be requested.

The district court's reasoning, although to me rather abstruse, apparently is that if an officer doesn't make a request for comp time early enough to assure that his replacement need not be paid time-and-a-half, then the officer will not have requested his time off within a reasonable period. The problem, of course, with that sort of reasoning is that it conflates the concept of the reasonable period within which the day off must be requested, and whether it is an undue disruption of the police department's operations to permit the time off to be taken. Thus, the plaintiffs' claim that the logbook is being declared full for a forbidden reason is never directly engaged.

The majority opinion likewise dodges the problem, simply by declaring that the whole issue is governed by the collective bargaining agreement, and the majority is "loath to interfere with [the] agreement."

To me, that answer, like the district court's answer, is no answer at all. The district court made a factual finding that "[a]s a general policy, the Division declined to call in officers on an overtime basis in order to permit another officer off for

compensatory time." Aiken, 985 F.Supp. at 745. In my opinion, this policy is precisely the practice the Department of Labor contemplated, and sought to forbid, when it declared that it would not be an undue disruption for an employer to ask one employee to work overtime in order to grant another employee time off. See Application of the Fair Labor Standards Act to Employees of State and Local Governments 52 C.F.R.2012, 2017 (1987). I would reverse the judgment of the district court with respect to this issue only. As to the remaining issues in the case, I concur in the majority opinion.

William Russell AIKEN, et al., Plaintiffs,

v.

CITY OF MEMPHIS, TENNESSEE, Defendant.

No. 93-2023-TUA.

United States District Court,
W.D. Tennessee,
Western Division.
Aug. 26, 1997.

CONSENT ORDER OF DISMISSAL OF CLAIMS

TURNER, District Judge.

The parties, through counsel, having advised the Court that the parties have reached a settlement with respect to Plaintiffs' claim for unpaid compensation for the home training, maintenance and care of police dogs and training time, and that those claims may be dismissed,

IT IS, THEREFORE, ORDERED that Plaintiffs' claims for unpaid compensation for home training, maintenance and care of police dogs and training time be and are hereby dismissed.

So ordered this 26th day of August, 1997.

William Russell AIKEN, et al., Plaintiffs,

v.

CITY OF MEMPHIS, TENNESSEE, Defendant.

No. 93-2023-TUA.

United States District Court,
W.D. Tennessee,
Western Division.

Aug. 8, 1997.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

TURNER, District Judge.

Plaintiffs, employees of the Memphis Police Services Division, filed this class action on January 7, 1993, alleging that the City of Memphis (the "City") had violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., by failing to pay them overtime wages. By order entered January 2, 1996, this court granted defendant's motion for partial summary judgment on issues relating to travel time and the "Location When Ill" Policy. On November 25, 1996, the parties submitted the case to the court on trial memoranda, stipulations, and exhibits for a final determination of the

remaining claims. Currently before this court are four issues: (1) whether the City's classification of police captains as exempt from overtime requirements is correct; (2) whether officers are entitled to compensation for time spent commuting to or from work in a police vehicle; (3) whether officers are entitled to compensation for time spent cleaning and maintaining police vehicles; and (4) whether the City's compensatory time policy is violative of the FLSA. The parties have reserved the issue of damages until liability has been determined.

I. General Findings of Fact

The City's law enforcement services are provided by the City of Memphis Police Services Division (the "Division"). The plaintiffs are or have been employees of the City and more particularly the Division. The City is a political subdivision of the State of Tennessee and a public agency within the meaning of 29 U.S.C. § 203(x). The City is also an enterprise within the meaning of 29 U.S.C. § 203(r).

II. Exempt Status of Captains

A. Findings of Fact

[1] The City does not pay overtime compensation to police captains because the City has classified them as salaried employees. Under the City's policies police officers, including captains, are subject to disciplinary suspensions without pay for periods of less than one day. No captain has ever been disciplined by receiving a suspension without pay.

B. Conclusions of Law

[2] The captain plaintiffs claim that the City wrongfully classified them as employees exempt from the overtime requirements of the FLSA. Under the FLSA, employers are not required to pay overtime compensation to "bona fide executives" who exceed the maximum work hours per week. 29 U.S.C. § 213(a)(1). The FLSA authorizes the Secretary of Labor to promulgate regulations defining bona fide executive. These regulations require an employee to have supervisory duties and be paid on a salary basis in order to be a bona fide executive. 29 C.F.R. § 541.1(f) & 541.117(a). The

"paid on salary basis" component means that an employee is paid a set amount per pay period regardless of the number of hours worked rather than on an hourly basis:

> [U]nder his employment agreement [the employee] regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

29 C.F.R. § 541.118(a). An exception to this rule is made for deductions taken when an employee is absent for a period of more than a day due to either personal reasons or sickness if the deduction follows a disability plan. 29 C.F.R. § 541.118(a)(2) & (3). The Department of Labor has specifically stated that this exception does not apply to absences of less than one day. U.S. Department of Labor, Wage and Hour Division, Letter Ruling of January 15, 1986. The City argues that even though the captains may be literally subject to a suspension without pay for less than one day, "the realities of the City's compensation scheme" should not be ignored and the captain plaintiffs should be treated as salaried employees.

(Def.'s Proposed Findings of Fact and Conclusions of Law at 16.) The employer bears the burden of proving that an employee falls within the exemption. Corning Glass Works v. Brennan, 417 U.S. 188, 196-97, 94 S.Ct. 2223, 2229, 41 L.Ed.2d 1 (1974).

The Supreme Court recently considered this issue in Auer v. Robbins, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). Auer involved a suit brought by sergeants and a lieutenant of the St. Louis Police Department. The plaintiffs claimed that they had been unfairly denied overtime compensation because they were wrongly classified as exempt employees. The plaintiffs contended that they did not met the "salary-basis test" for exempt employees because a provision in the St. Louis Metropolitan Police Department Manual subjected them, and other ranks of police officers, to reductions in pay for disciplinary infractions relating to the quality or quantity of work they performed. Only one sergeant had ever had his pay reduced for a disciplinary infraction.

The Secretary of Labor filed an amicus brief explaining that the salary-basis test delineated in the regulations is met when "there is either an actual practice of making [deductions in pay for disciplinary infractions] or an employment policy that creates a 'significant likelihood' of such deductions." Id. at ----, 117 S.Ct. at 910. The Court deferred to the Secretary's interpretation of this regulation because it found his interpretation not to be clearly erroneous or inconsistent with the regulation. Id. at ----, 117 S.Ct. at 911; see also Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989). The Court found that the lieutenant and sergeants were not significantly likely to be subject to such deductions. Id. The police manual covered all department employees and could be interpreted as subjecting only those employees who were not paid on a salary basis to disciplinary deductions:

> If the statement of available penalties applied solely to petitioners, matters would be different; but since it applies both to petitioners and to employees who are unquestionably not paid on a salary basis, the expressed

> availability of disciplinary deductions may have reference only to the latter. No clear inference can be drawn as to the likelihood of a sanction's being applied to employees such as petitioners.

Id. at ----, 117 S.Ct. at 911. The Court then affirmed the Court of Appeal's determination that the employees had met the salary-basis test and were exempt from the overtime pay provisions of the FLSA.

The present case is closely analogous to Auer. No captain in the Memphis Police Department has ever been subjected to disciplinary deductions in his pay. The policy applies to police employees, other than captains, who are unquestionably not salary-based employees. This court is bound to follow the Supreme Court's determinations, and therefore finds that the salary-basis test is met and that the captain plaintiffs are exempt from the overtime provisions of the FLSA.

III. Commute Time

A. Findings of Fact

Plaintiffs also claim that the City violated the FLSA by

failing to compensate them for time spent commuting to or from work in police vehicles. The parties have stipulated that the City provides vehicles for some officers to use in commuting to and from work. These officers are requested to keep the radios on in the vehicles during their commutes. Additionally, an officer in such a vehicle is required to take appropriate law enforcement action if they encounter a disabled vehicle or observe a crime being committed during their commute. The officers are aware of the requirements to which they must adhere if they take a vehicle home. The use of these vehicles is strictly voluntary.

B. Conclusions of Law

In August of 1996, Congress passed the Employee Commuting Flexibility Act ("ECFA"), which amends the Portal-to-Portal Act, 29 U.S.C. § 254(a). The ECFA applies to any litigation pending but not decided at the time of the enactment of the ECFA. The ECFA specifically provides:

> Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act

of 1938, ... on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and *744
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

....

In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, . . . in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

29 U.S.C. § 254. Based on this statute, plaintiffs concede that the City is not required to compensate officers for commuting time if the City can establish that it has an agreement with its employees with respect to the use of the vehicle. (Pl.'s Trial Mem. at 29.) This agreement requirement may be satisfied through "a formal written agreement between the employee and employer, a collective bargaining agreement between the employees [sic] representative and the employer, or an understanding based on established industry or company practices." H.R.Rep. No. 104-585 (1996).

Here, the employees have an understanding based on the City's practices regarding the use of the vehicle. This understanding is sufficient to meet the agreement requirement under the ECFA. Therefore, the City is not required to compensate officers for time commuting in police vehicles.

IV. Vehicle Maintenance

A. Findings of Fact

Officers taking the City vehicles home are also required to maintain these vehicles and to keep them clean. As to the maintenance of the vehicles, the parties have offered conflicting versions of the facts. The plaintiffs' claim that the officers are required to perform minor maintenance on their vehicles. The City, on the other hand, states that it has a contract with local facilities to perform the maintenance at the City's expense and that the officers are merely required to schedule that maintenance. The stipulations of the parties submitted to this court do not resolve this conflict. The parties have stipulated what maintenance must be done, how long that maintenance would take, and that the City maintains a contract with a local motorcycle shop to perform maintenance on the motorcycles. (Stipulations at 2.) However, the employee bears the burden of proving that he has performed work for which he should have been compensated but was not. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687, 66 S.Ct. 1187, 1192, 90 L.Ed. 1515 (1946). Because the officers have failed to submit proof that they must perform the maintenance

themselves, this court finds that the officers are only required to schedule the maintenance.

B. Conclusions of Law

Whether the City is required to compensate the officers for maintaining and cleaning their vehicles is also governed by the ECFA. If that activity is "incidental to the use of an employer-provided vehicle for commuting," it is not compensable. 29 U.S.C. § 254. The House Report accompanying the ECFA states that "[i]t is not possible to define in all circumstances what specific tasks and activities would be considered 'incidental' to the use of an employers [sic] vehicle for commuting.... [R]outine vehicle safety inspections or other minor tasks have long been considered preliminary or postliminary activities and are therefore not compensable." H.R.Rep. No. 104-585 (1996).

The officers bear the burden of proving that the City has violated the FLSA by not compensating them for work they have performed. Anderson, 328 U.S. at 687, 66 S.Ct. at 1192. They have not submitted any evidence to establish that

requiring the officers to maintain their vehicles in a clean condition is other than a minor task considered incidental, and therefore noncompensable, under the ECFA. Keeping one's vehicle clean is no more arduous than routine safety inspections. Since no proof has been offered to the contrary, the officers have failed to carry their burden of establishing that this time is compensable under the FLSA.

Further, this court finds that plaintiffs have failed to establish that they are required to perform any maintenance on the City vehicles which they take home. Additionally, the scheduling of maintenance on the vehicles is a minor task incidental to the use of the vehicle and not compensable under the FLSA.

V. Compensatory Time

A. Findings of Fact

The officers have also claimed that the City's compensatory time plan violates the FLSA. The City allows officers who work in excess of forty-three hours per week to receive either monetary compensation at a rate of one and one-

half times the employee's hourly rate or compensation in the form of time off at a rate of one and one-half hours for each hour worked in excess of forty-three.[1] When an employee wants to use the compensatory time he has earned, he must sign his name in a "logbook" and receive permission from his supervisor. An employee can place a request to use his compensatory time beginning thirty days before the requested time until the day he wants off. Once enough people have signed up to be off on a particular day such that the supervisor determines the department cannot effectively function with any more people off, the supervisor will indicate in the logbook that no one else may sign up to have compensatory time off on that day. The number of people allowed to sign up on a particular day varies with department and day. The parties have stipulated that compensatory time off is often

[1] The compensatory time plan allows officers to accumulate time up to a maximum of 480 hours. Once an officer reaches this maximum, he must take monetary compensation for overtime hours. If an employee separates from the city, he is entitled to cash payment for accumulated but unused compensatory time. These elements are also required by the FLSA, but are not at issue in this case. See 29 U.S.C. s 207(o).

granted when requested, but that officers have been denied requested time off when others want the same day off. On most occasions when an officer has requested compensatory time off but been denied that time because others had previously requested it, the City could have allowed the officer the time off by paying another officer overtime compensation to work in the requesting officer's place. As a general policy, the Division declined to call in officers on an overtime basis in order to permit another officer off for compensatory time. A denial of compensatory time off, however, only occurred occasionally and was not routine. Additionally, an officer's request to have a day off may be granted and later rescinded if, due to sickness or injury, the department does not have enough officers to operate safely and effectively.

Plaintiffs claim that this plan violates the FLSA because they are not always able to take the compensatory time off when they request it even though the City could grant their requests by paying other officers at an overtime rate. The

City asserts that the requirement that the officer sign up for compensatory time before the log is full is merely the understanding or practice of the parties as to the "reasonable period" within which to request time off (i.e., if an officer did not request time off before the log was full, he did not request time off within a reasonable period of time).

B. Conclusions of Law

The FLSA allows public agencies to compensate their employees with compensatory time off at a rate of not less that one and one-half hours for each hour of employment for which overtime is required, provided that the agency follows certain criteria delineated in 29 U.S.C. § 207(o). The only criterion that plaintiffs claim the City does not meet is that an employee who has accrued compensatory time "shall be permitted to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the agency." 29 U.S.C. § 207(o) (5). The statute does not define what constitutes an "undue disruption" or a "reasonable period."

In Heaton v. Moore, 43 F.3d 1176 (8th Cir.1994), the Eighth Circuit considered whether having to pay overtime compensation constitutes an undue disruption. In Heaton, the Department of Corrections for the State of Missouri had a policy of forcing employees to use their compensatory time. The Department of Corrections claimed that this policy was necessary to thwart the undue disruption that would result if it later had to pay overtime to its employees if they had accumulated more than 480 hours. The Eighth Circuit held that the unduly disruptive language was only important if the employee had requested to use compensatory time and the request had been denied. Id. at 1181. The court went on to say, arguably in dictum, that "the eventual payment of overtime compensation as mandated by the FLSA cannot be deemed 'unduly disruptive' of the DOC's operation." Id. The court also explained that the employer has control over this situation from the front-end: "Employers are free to schedule less overtime and/or hire more corrections officers to reduce the need for compensatory time. As we have previously observed,

'[a] fundamental purpose of the Fair Labor Standards Act was to encourage employers to distribute work among a larger number of employees rather than to work employees overtime.'" Id. (citing Marshall v. Hamburg Shirt Corp., 577 F.2d 444, 446 (8th Cir.1978)); see also Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 423-24, 65 S.Ct. 1242, 1244-45, 89 L.Ed. 1705 (1945) (explaining the purpose of the FLSA overtime provision); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 577-78, 62 S.Ct. 1216, 1219-20, 86 L.Ed. 1682 (1942) (also explaining the purpose of the FLSA overtime provisions).

This court agrees with the Eighth Circuit that the necessity of paying overtime compensation does not constitute an undue disruption within the meaning of the FLSA. The Division, however, argues that its policy of not allowing compensatory time off once the logbook is full merely requires requests to be made within a reasonable period.

"Reasonable period" is defined in the Department of Labor Regulations:

> (c) Reasonable Period. (1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff.
>
> (2) The use of compensatory time in lieu of cash payment for overtime must be pursuant to some form of agreement or understanding between the employer and the employee (or the representative of the employee) reached prior to the performance of the work.... To the extent that the conditions under which an employee can take compensatory time off are contained in an agreement or understanding as defined in § 553.23, the terms of such agreement or understanding will govern the meaning of "reasonable period".

29 C.F.R. § 553.25. The Memoranda of Understanding between the City and the plaintiffs provides that compensatory time off will be given through the use of the logbook. Once the slots in the logbook are full, an employee would be denied compensatory time off unless an emergency existed or a

substitute was found. This agreement is the type contemplated in the Department of Labor Regulations and therefore governs the meaning of "reasonable period" in this context. Thus, the plaintiffs were allowed compensatory time off when it was requested within a reasonable time and the City's policy to this effect does not violate the FLSA.

VI. Conclusion

This court holds that the captain plaintiffs are salaried employees within the meaning of the FLSA, and are therefore exempt from its overtime provision. The police officers are not entitled to compensation for time spent commuting to and from work in police vehicles or for time spent keeping these vehicles clean or scheduling their maintenance. Finally, the City's compensatory time policy is not violative of the FLSA because City employees who have earned compensatory time are able to use this time when it is requested within a reasonable period.

On the issues addressed herein, a judgment of dismissal shall be entered for the defendants.

At the pretrial conference when the issues herein addressed were submitted to the court, counsel indicated that certain other issues had been resolved through compromise. No order to that effect has been submitted. Counsel should provide the court with the appropriate order within ten days following entry of these Findings of Fact and Conclusions of Law.

IT IS SO ORDERED this 8th day of August, 1997.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

WILLIAM RUSSELL AIKEN, et al.,

V. NO. 93-2023-TUA

CITY OF MEMPHIS, TENNESSEE

Defendant.

ORDER ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Employees of the Memphis Police Services Division filed this claim on January 7, 1993, under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., alleging that the City of Memphis had failed to pay them overtime wages in violation of the FLSA. Plaintiffs' class was initially comprised of 390 persons; however, that number has subsequently decreased to 365 persons.

Plaintiffs have set forth seven specific allegations under the FLSA:

(1) Plaintiffs are entitled to overtime compensation for time they were confined to their homes under defendant' s

sick leave or "Location When Ill" Policy;

(2) Plaintiffs are entitled to overtime compensation as a result of shift scheduling;

(3) Plaintiffs are entitled to overtime compensation for time spent in training;

(4) Plaintiffs are entitled to overtime compensation for time spent caring for and transporting canines;

(5) Plaintiffs are entitled to overtime compensation relating to a vehicle provided by defendant and travel time;

(6) Plaintiffs are entitled to overtime compensation for defendant's alleged refusal to allow plaintiffs to use their accumulated compensatory time; and

(7) Plaintiffs are entitled to overtime compensation because they were improperly classified as exempt under the FLSA.

Defendant has moved for summary judgment on plaintiffs' claims numbers 1, 2, 3, 4, and 7. After consideration of

defendant's motion for summary judgment, plaintiffs have agreed to voluntarily dismiss their claims for overtime compensation based on shift scheduling (claim #2) and exemption (claim #7) with respect to plaintiffs Friedman, Ruff, Reynolds and Crawford. Therefore, the allegations before the court on the summary judgment motion are claims 1, 3, and 4.

SUBSTANTIVE LAW

1. Summary Judgment Standard

The moving party is entitled to summary judgment where there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). When considering a motion for summary judgment, the court's function is not to weigh the evidence or judge its truth; rather, the court must determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules ... designed 'to secure the just, speedy and

inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). The substantive law governing the case will determine what issues of fact are material. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989).

A summary judgment movant "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986). Once that burden is met, it shifts to the non-moving party to set forth specific facts showing a genuine issue of triable fact. Fed. R. Civ. P. 56(e). To meet this burden, the non-movant must do more than present some evidence that there is a disputed issue. Rather, the non-movant must present sufficient admissible evidence upon which a jury could return a verdict favorable to the non-moving party. Anderson, 477 U.S. at 249-50. Where a disputed issue of material fact is presented by

countervailing admissible evidence, the non-movant's version of such fact is presumed correct. Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 456 (1992).

2. Fair Labor Standards Act

The FLSA was enacted in 1938 to "achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 602 (1944); see also Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 39 (1981) (FLSA enacted to ensure each employee covered by the Act receives a "fair day's pay for a fair day's work") (quoting Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 578 (1937). In 1974, Congress extended the FLSA to apply to state and local governmental bodies in addition to the federal government. 29 U.S.C. § 203(d) & (x). The FLSA requires that employees who perform more than forty "hours worked" within their regular workweek be compensated at time and one-half the "regular rate of pay" for those additional hours. 29 U.S.C. §§

207(a) (1). Because defendant is a political subdivision of the State of Tennessee, it is subject to the regulations set forth within the FLSA.

Although the FLSA clearly requires the payment of overtime wages for overtime worked, it does not set forth exactly what "type" of work is eligible for such overtime pay. See Reich v. New York City Transit Auth., 45 F.3d 646, 648 (2d Cir. 1995) ("While Congress made clear that employers are required to compensate employees for 'work' or 'employment,' it did not define the contours of the type of 'work' or 'employment' that merited such compensation."). The instant case is a dispute regarding whether various activities performed by employees are compensable under the FLSA. Although the Portal to Portal Act, which amended the FLSA in 1947, 29 U.S.C. § 251, et seq., was an attempt by Congress to "delineate certain activities which did not constitute work, and therefore did not require compensation," the Act did not resolve all potential issues under the FLSA. Thus, the matter before the court requires interpreting the

contours of coverage under the FLSA with respect to the particular circumstances presented in this case.

A. Location When Ill Policy

i. Factual Context

Plaintiffs have filed a claim for overtime compensation for hours spent at home, beyond the eight hour work day, in compliance with the defendant's "Location When Ill Policy ("LWI Policy"). Defendant's LWI Policy regulates the activities of employees who are on either sick leave or leave for on-the-job injuries. This policy, contained in Rule DR 1104 of Police Department Regulations, provides in relevant part:

A member reporting sick or injured shall be confined to his or her residence, clinic, or hospital, except to visit his or her personal physician or by permission of his or her supervisor. [2]

[2] After this lawsuit was filed defendant amended DR 1104 to require an employee on sick or on-the-job injury leave to only remain at home during the eight hour block of time that would normally constitute his regular work day.

The gravamen of plaintiffs' complaint is that defendant's LWI Policy so constrained their activities while on sick or injury leave that those hours spent confined in their homes should be calculated as overtime worked.[3] Because plaintiffs could not leave their homes without defendant's permission, which plaintiffs assert was denied as a matter of practice, they argue that they were "on call" to defendants and that such "on call" time is generally considered overtime when it seriously restricts an employee's activities. Plaintiffs argue that the severity of the restrictions entitle them to overtime compensation under the FLSA.

Plaintiffs allege that when they were on sick or job injury leave, they were confined to their residences twenty-four hours per day on each day that such leave was taken, and on the weekends surrounding those leave days. According to

[3] Plaintiffs are not requesting compensation for the eight hours per day that they spent asleep, or the forty hours per week for which they have already been paid.

plaintiffs, defendant's LWI Policy prohibited employees from engaging in any personal activity outside of their home during the entire twenty-four hour period for which they had taken leave. Such restrictions allegedly applied irrespective of the particular nature of the individual employee's ailments or illnesses; therefore, if an employee had broken his leg and was unable to perform police duties but was well enough to visit friends or engage in other activities, that employee was still confined to his home for the duration of his leave time.

The practical import of the LWI Policy, plaintiffs contend, was that plaintiffs were only allowed to leave their homes to obtain medical care, and even then they had to have the permission of their supervisors. Defendant did enforce the policy by making repeated telephone calls to employees that were home sick without regard to the normal work hours of the sick employee. Further, defendant also apparently encouraged the use of in-person checks in which supervisors would go to the residences of employees on sick leave and verify that they had not left their homes.

Plaintiffs contend that they should be compensated for those hours confined under the LWI Policy because defendant derived a clear benefit from the policy by curtailing potential abuse of sick leave and ensuring that its employees were ready at all times to respond to city emergencies. Employees that were found in violation of the policy were issued reprimands and suspensions without pay. The defendant contends that the rule was enforced as written -- that is, that the officers merely needed to request permission to leave home. Therefore, defendant asserts that the restrictions cannot be found to be severe and onerous.

ii. Applicable Law

The Supreme Court has consistently held that under certain circumstances, waiting time, stand-by time and on-call time are compensable under the FLSA. Skidmore v. Swift & Co., 323 U.S. 134 (1944); Armour & Co. v. Wantock, 323 U.S. 126 (1944). The basic litmus test for whether such on-call time is compensable is whether "the restrictions imposed are so onerous as to prevent employees from effectively using the time for personal pursuits.' Martin v.Ohio Turnpike Comm'n,

968 F.2d 606, 611 (6th Cir. 1992), cert denied, ____U.S. ____ 113 S. Ct. 979 (1993). This test "requires consideration of the agreement between the parties, the nature and extent of the restrictions, the relationship between the services rendered and the on-call time, and all surrounding circumstances." Boehm v. Kansas City Power & Light Co., 868 F.2d 1182, 1185 (citing Skidmore, 323 U.S. at 137). Courts look to the particular factual circumstances of each case in order to determine whether or not the on-call time in question should be compensable, Id.

Some courts have distinguished between employees who are "waiting to be engaged" and those that are "engaged to be waiting" to determine whether overtime compensation is warranted. See e.g., Halferty v. Pulse Drug Co. Inc., 864 F.2d 1185, 1189 (5th Cir. 1989). The distinction is that when idle time is spent predominantly for the benefit of the employer, the employee is engaged to be waiting, while if the idle time is spent for the benefit of the employee, the employee is waiting to be engaged. Id. Those courts that recognize the distinction

have determined that when the employee is engaged to be waiting, he should be entitled to compensation, but if he is waiting to be engaged, he should only be paid for time actually worked. Id. Therefore, once again the critical issue in deciding whether an employee should be compensated is whether that employee can use the time effectively for his or her own purposes. Id. If employees can visit friends, pursue hobbies, watch television, eat and sleep and engage in like activities, they are generally considered to be free to use the time for their personal benefit. See Allen v. Atlantic Richfield, 724 F.2d 1131 (5th Cir. 1984) (on-call time not compensable where workers had to remain at plant twenty-four hours a day and work twelve hours while the other twelve they were free to sleep, eat at no expense, watch movies, play pool or cards, exercise, read, or listen to music); Norton v. Worthen Van Serv., Inc., 839 F.2d 653, 655-56 (10th Cir. 1988) (Time spent by drivers waiting "on call" not compensable under FLSA because drivers were not required to remain on or near employer's premises while on call, and could pursue personal

business between assignments); Pilkenton v. Appalachian Reqional Hosps., Inc., 336 F. Supp 334, 336 (W.D. Va. 1971) (on-call time not compensable because time spent by plaintiffs on call was predominantly for their own benefit and not their employers).

In Martin, the Sixth Circuit held that the court must examine the restrictions placed on the employee to determine this issue. "[T]he employees must show that the on-call policy imposes additional burdens [than Just being on call] that seriously interfere with their ability to use the time for personal pursuits." 968 F.2d at 611.

Here, defendant's LWI Policy certainly restricted the activities of its employees to some extent because employees were confined to their homes during sick or Job injury leave unless they had permission to leave home. Although employees were permitted to eat, sleep, watch television, or engage in any activity inside of their home, they were prohibited from visiting friends or doing anything else outside of their residences unless they received permission to do so.

Plaintiffs have provided various examples of the restrictions imposed upon employees on sick or job injury leave for which reprimands were issued. Such examples consistent of the following type of situations:

1. An officer recovering from an on-duty motor vehicle accident who left his home to attend a meeting of the Alumni Association at a fraternity house.

2. An officer who was recuperating from surgery and who worked part-time at a radio station until she was well enough to resume her duties as a police officer.

3. An officer who was on sick leave and left his home to pick up his son for visitation.

4. Two officers who were on sick leave for stomachaches and were not at home when whereabouts checks were performed.

5. An officer who was home for on-the-job injury leave and left work to go to the store.

6. An officer who was home on sick-leave for back pain and left his home, without a supervisor' s permission, to pick up medication. After getting his medication, he fell asleep at a cousin's house and missed three whereabouts checks.

7. An officer who called in with a toothache and recuperated at his girlfriend's house.

8. An officer who was home with gastritis and

who notified the department that he was changing locations.

9. An officer who used sick leave to attend the funeral of a family member.

See Pls.' Supplemental Resp. to Def.'s Mot. for Partial Summ. J. at 2-7.

In these examples, however, there is no showing that the officers sought and were denied, as a matter of practice, permission to carry on their activities away from home. The rule as written clearly provides that they would have been permitted to carry on these activities if they had requested and received permission. However, there is no evidence that these officers ever requested permission. The court concludes that the policy as written is not in any sense so onerous as to prevent the officers from effectively using the time for personal pursuits. Upon requesting and receiving permission, the officers were able to do anything at any location. The record simply does not permit any reasonable juror to conclude otherwise.

The plaintiffs, however, argue that the rule was not in practice what it is in writing. They assert that defendant "construed DR 1104 to allow employees to leave their residences only to obtain medical care, and then only with the permission of their supervisors." Pls.' Mem. in Resp. to Def.'s Mot. for Partial Summ. J. at 8. Plaintiffs cite to and rely on the affidavits of Jerry Moses, Robert Collins and Wanda Dodd.

The affidavit of Jerry Moses filed May 3, 1995, states that he was only allowed to obtain medical care with the permission of his supervisors. It does not indicate that permission to leave the residence was denied routinely as a matter of practice. In fact, at paragraph 16, he states that the employee would be disciplined for not being at home unless he had received prior approval to leave the home. The affidavit of Robert Collins merely testifies to his "understanding," not to the alleged practice, of denying permission as a matter of practice to leave the home upon request. The affidavit of Wanda Dodd speaks only to her "understanding" of the policy, not to the actual method or

routine manner of its application.

The court concludes after reviewing this evidence that the plaintiffs have not cited to any evidence in the record to support their argument that DR 1104 was enforced in practice by the routine refusal to grant officers permission upon request to leave their homes. Lacking such evidence there is no genuine dispute of material fact that the policy in question -- either as written or otherwise -- was so severe and onerous as to prevent employees from effectively using the time for personal pursuits.

Accordingly, the court grants the defendant' s motion for summary judgment on plaintiffs' claim for overtime compensation pursuant to defendant's LWI Policy.

B. Training Time

i. Factual Context

Plaintiffs allege that they have not been compensated for specialized training that they completed pursuant to defendant's encouragement. Specifically, several plaintiffs

contend that they were not compensated for training completed in bus driving. Those plaintiffs argue that the purpose of the bus driving training was to qualify them to drive buses of large numbers of officers in the event of a riot or other similar civil disturbance. Although these plaintiffs were compensated for some of the time spent in bus driver training, they were not compensated for the first day of training and argue that they are entitled to that compensation. Another group of plaintiffs allege that they were not compensated for training in crisis intervention and hostage negotiation. Specifically, those plaintiffs affected seek compensation for a four hour long psychological exam they were forced to undergo in satisfaction of the crisis intervention training.

ii. Applicable Law

Time spent by employees in training is generally compensable. However, 29 C.F.R. § 785.27 provides an exception to that general rule when the following four-part test is satisfied:

(a) Attendance is outside of the employee's regular working hours;

(b) Attendance is in fact voluntary;
(c) The course, lecture, or meeting is not directly related to the employee's job; and
(d) The employee does not perform any productive work during such attendance.

Id. Therefore, the question before the court is whether the bus driving and crisis intervention training is exempt from regular compensation requirements.

The evidence before the court indisputably reflects that those plaintiffs who underwent the training at issue did voluntarily attend that training outside of their regular hours; thereby satisfying the first two prongs of the test.[4] However, the court further finds that a genuine dispute of fact exists regarding the third and fourth prongs of the test: whether the crisis intervention and hostage negotiation training were related to the employee' s job and whether the employee performed any productive work during the training. Because the third and fourth factors cannot be met, the court denies

[4] Officers in bus driving training were paid, but there is a dispute whether they were paid for the entire time spent in training. The court is unable to resolve that dispute on motion for summary Judgment.

defendant's motion for summary judgment on the training issue.

The crisis and hostage training apparently benefited the police department because defendant needs such trained officers in the event of an emergency. Further, plaintiffs have also set forth sufficient evidence that their time spent during training was productive because they learned the skills necessary to function in their special capacities. In Mumbower v. H.R. Callicott, 526 F.2d 1183, 1187 (8th cir. 1975), the court held that:

> The employer who wishes no such work to be done has a duty to see it is not performed. He cannot accept the benefits without including the extra hours in the employee' s weekly total for purposes of overtime compensation. If the employer has the power and desire to prevent such work, he must make every effort to do so,

(citing 29 C.F.R. § 785.13). Here, there is no indication that defendant did anything but encourage the plaintiffs to undergo the relevant training. Therefore, because a reasonable fact-finder could conclude that plaintiffs should be compensated

for overtime spent in specialized training, the court denies defendant's motion for summary judgment on that claim.

C. Canine Squad

i. Factual Context

Included among the police officers that are bringing this suit are officers who functioned as canine handlers for the Police Department. Canine handlers feed, exercise, groom and otherwise care for the police dogs during their off-duty hours. The canines are housed by the officer at his or her residence and canine officers are responsible for transporting the dogs to and from work in their respective police cars.

Plaintiffs that are within this group of canine handlers are seeking compensation under the FLSA for both time spent at home caring for the dogs and the transportation of the dogs to and from work. Defendant has moved for summary judgment only on the travel time issue contending that the time spent transporting the canines to and from work is not compensable under the FLSA.

ii. Applicable Law

The Portal to Portal Act ("Portal Act"), 29 U.S.C. § 251, amended the FLSA in 1947 to exempt employers from compensating their employees for preliminary activities that were "relatively effortless, [and] that were thought to fall outside the conventional expectations and customs of compensation.. Reich v. New York City Transit Auth., 45 F.3d 646, 648 (2d Cir. 1995). Specifically, the Portal Act provides that employers are not liable to employees under the FLSA for the following activities:

> (1) [W]alking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) [A]ctivities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time On any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a)(1) & (2). Therefore, the plain language of the Portal Act appears to render plaintiffs' claim for

compensation for travel time to and from work with the dogs noncompensable. However, § 254(a)(2) does, by implication, allow for an exception for preliminary or postliminary activities that are a necessary part of the principal activity. It is plaintiffs' contention that the responsibilities involved in caring for the dogs during the commute fall within the "principal activity" exception to the general rule of noncompensability for travel time.

Defendant argues that plaintiffs have not submitted any proof demonstrating that they engaged in activities during their commute to work which are compensable under the FLSA as amended by the Portal Act. Conversely, plaintiffs contend that canine transportation is a principal activity entitling them to compensation under the Act. To support their position that the duties performed while transporting the dogs to and from work rose to the level of compensable activity under the FLSA, plaintiffs have submitted affidavits by employees Stephen Comella, Kenneth J. Connatser and Jane Taylor Martin. The Comella, Connatser and Martin affidavits describe, among other things, the responsibilities of the canine

handlers during commute time and document specifically which activities should entitle those officers to compensation.

As previously noted, the Portal Act specifically excludes travel time to and from work from compensability under the FLSA. 29 U.S.C. § 254 (a)(1). However, an exception exists for preliminary or postliminary activities that are so integral to an employee's "principal activities," that the time is deemed compensable. Although no bright line test exists to determine whether or not any particular conduct constitutes a "principal activity," id., at 649, the Supreme Court has held that duties should be considered compensable if they are "an integral and indispensable part of the principal activities for which covered workmen are employed." Steiner v. Mitchell, 350 U.S. 247, 256 (1956). Since the Supreme Court's decision in Steiner, a myriad of different factual circumstances have presented themselves to the courts,[5] and

[5] See Mitchell v. King Packing Co., 350 U.S. 260 (1956) (knife-sharpening for butchers before and after work is principal activity); Barrentine v. Arkansas-Best Freight Sys., Inc., 750 F.2d 47 (8th Cir. 1984), cert. denied, 471 U.S. 1054 (1985) (Time spent driving company trucks to garage for repairs was compensable principal activity for truck drivers); Vega v. Gasper, 36 F.3d 417, 424-27 (5th Cir. 1994) (lengthy bus transportation of agricultural workers to fields not compensable where employees not required to travel in company bus).

consequently some guiding principles on identifying "principal activities" have emerged.

One such precept is that the more the preliminary or postliminary activity is undertaken for the benefit of the employer, as well as necessary for the employee to successfully complete his or her work, the more likely it is to be a compensable principal activity. Reich, 45 F.3d at 650. However, if such preliminary or postliminary work is so minimal as to render its calculation futile, then that potentially compensable time is generally disregarded. Id. See Andersen v. Mr. Clemens Pottery Co., 328 U.S. 680, 692 (articulating de minimis doctrine) ("When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.").

Therefore, one question before the court on the canine travel time issue is whether commuting with the dogs is so

indispensable to the employee's workday as to render it compensable under the FLSA. However, even if the plaintiffs can meet that indispensability threshold, they must also demonstrate that the time spent caring for the dogs during the commute is more than just de minimis. The majority of courts faced with this issue have found that, as a matter of law, any duties performed by canine officers during the commute to and from work are minimal and therefore not compensable. See Reich, 45 F.3d at 652 ("Considered in the aggregate, the time spent by handlers in dog-care duties during the commute was neither subs tantial, nor regularly occurring"); Truslow v. Spotsylvania County Sheriff, 783 F.Supp. 274, 277 n.5 (E.D. Va. 1992) (holding that as matter of law defendants are not required to pay employees for commuting time with the dogs); Andrews v. DuBois, 888 F. Supp. 213, 219 (D. Mass. 1995) ("From the record, it appears that the presence of the dogs during the travel to and from work rarely adds even marginal amounts of time to the officers' regular commute. While it is true that loading the animals in and out of the car requires some degree of time and effort, this effort is so negligible as to be de minimis and therefore not compensable."); but see

Graham v. City of Chicago, 828 F. Supp 576, (N.D. Ill. 1993) ("[T]ime spent transporting police canines is more than merely 'riding' to work ... it is an integral and indispensable part of the officers' principal duties as canine police officers and thus not excluded from coverage.").

This court adopts the reasoning of the Second Circuit in Reich which held that only "true dog-care work occurring during the commute" is compensable. Reich, 45 F.3d at 652. After evaluating the Conflicting precedent on this issue, the Reich court returned to the "basic principle that underlies the FLSA: Employees are entitled to compensation only for 'work.'" Id. at 651. After reviewing the record, the Reich court held that the amount of time spent by the canine handlers actually working during the commute to and from work was de minimis and therefore not compensable. See id. at 652. However, the court was reviewing the record after a three day bench trial in the district court where the facts were presented and weighed by the fact- finder, not after summary judgment as in the instant case. The plaintiffs in this case have submitted affidavits detailing their responsibilities during the commute. Those duties are once again outlined in plaintiffs' statement of

undisputed facts at 78-92. Determining whether an activity is preliminary or postliminary to a principal activity is a mixed question of law and fact. Graham, 828 F. Supp at 582. "The precise nature of the Plaintiff' S duties is a question of fact while the application of the FLSA to those duties is clearly a question of law." Id. Because the facts contained in the relevant affidavits are undisputed with respect to the officers' duties during canine transportation, this court is simply charged with determining how the law applies to those undisputed facts. Thus, the issue of whether the canine transportation is compensable in this case is appropriate for summary judgment.

The Comella, Connatser and Martin affidavits set out the range of duties that officers are engaged in during their commute to and from work with their canines. Plaintiffs argue that they should be compensated for those activities which consist of: constantly monitoring the dogs in the car, verbal discipline and control of the dogs when they are affected by outside stimulus, keeping the windows open for the dogs despite the weather, and monitoring their radios so that they can respond to calls during the commute. Plaintiffs further

allege that their regular duties in caring for the dogs such as feeding, training, walking and cleaning up after them[6] also occur during the commute to and from work.

> The court finds that although there may be instances where plaintiffs have to spend some extra moments caring for the dogs during transportation time, those "few moments" are de minimis and simply not worthy of compensation under the FLSA. As the court held:
>
> > While there are occasions where dogs need to be walked or restrained, or the car requires cleaning, during the major part of commuting time no work is required. The handler merely drives with the dog in the back seat. The mere presence of a dog does not make the commute compensable.

45 F.3d at 652. See also Andrews, 888 F. Supp. at 219 ("[T]he majority of cases that have confronted the issue of police

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[6] It is unclear to the court how the extra cleaning time that plaintiffs must spend on account of the dogs should translate into compensation for travel time. If plaintiffs believe they are entitled to compensation for cleaning time, they should request a cleaning allowance or reimbursement for that specific activity. Cleaning their vehicles is unrelated to the claim for actual time spent commuting to and from work with the canines. See Levering, 869 F. Supp at 29 ("While cleaning time and damage to the vehicle might support a request for a cleaning allowance, it is not clear how that damage and cleaning time justifies compensation for the time spent in travel.").

officers commuting with their dogs ... have concluded that such activity is explicitly excluded by the Act and that officers should not be compensated for doing what they would have to do anyway – getting themselves to work."). Should a situation arise where a canine handler has to perform an unusually significant duty during the commute which involves his dog, that handler can submit an independent request for compensation for that particular activity. If that particular activity is time actually worked and is more than de minimis, defendant has an obligation to compensate its employee for that time. However, the record before the court in this case does not contain any evidence of more than de minimis responsibilities that the canine handlers must perform during their commute to and from work. Accordingly, the court grants defendant's motion for summary judgment on the canine transportation issue.

CONCLUSION

For the reasons discussed above, defendant's motion for summary judgment is granted as to the claims under the "Location When Ill" Policy and for travel time spent while transporting canines to and from work. The motion for summary judgment on the training time issue is denied.

IT IS SO ORDERED this 29th day of December, 1995.

FILED
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CLERK

(3)

No. 99-970

IN THE

Supreme Court of the United States

WILLIAM RUSSELL AIKEN, *et al.*,

Petitioners,

v.

CITY OF MEMPHIS, TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONSE TO QUESTIONS PRESENTED

Petitioner's "Questions Presented" do not properly state the issues. They may be correctly stated thus:

1) Where an agreement negotiated between a City and its police officers through their designated bargaining representative governs procedures for officers' use of compensatory time off within a reasonable period after their request for same, pursuant to which officers' requests for particular days are granted or denied based on the minimum staffing needs of the relevant precinct or bureau on the days in question, does such a practice violate the Fair Labor Standards Act of 1938 (FLSA) and pertinent regulations of the Department of Labor (DOL)?

2) Under relevant decisions of this Court and DOL regulations, does the FLSA require a City to provide its police officers overtime pay for all waking hours while at home on paid sick leave solely because the City requires officers on sick leave to notify their supervisor before leaving home, where permission to do so has never been denied, and where officers on sick leave are not subject to being called in to work?

PARTIES TO THE PROCEEDING

In addition to the individual parties listed by Petitioners, the City of Memphis, a political subdivision of the State of Tennessee, is a party.

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STATEMENT OF THE CASE[1]

A. Statement of Facts

Respondent submits the following additional facts from the record:

The City has long recognized the Memphis Police Association (MPA) as the designated bargaining representative for Memphis police officers below the rank of lieutenant for purposes of entering into agreements with the City concerning wages, hours and conditions of employment. Apx. at 657, 1378.[2] At all pertinent times the City and the MPA were parties to a series of negotiated Memoranda of Understanding (Memoranda) governing these areas. *Id.* The Memoranda contain grievance and arbitration procedures for resolving disputes thereunder. *Id.*

Compensatory Time

The Memoranda contain specific provisions governing officers' use of compensatory time off ("comp time"). Under the Memoranda, officers who work overtime (OT) may choose between receiving OT pay (1-1/2 times their regular pay rate) or comp time (1-1/2 hours for each hour of OT worked). Apx. at 1377-1378, 1381.

An officer who wishes to use accrued comp time must tell a supervisor. Each precinct or bureau maintains a log

1. Record references are to the Appendix filed with the Sixth Circuit Court of Appeals.

2. The MPA did not join in this lawsuit, nor did 3/4 of the City police officers.

book in which officers may sign up to use comp time. As a general rule, officers may request comp time any time within 30 days of the requested day off by asking their supervisors to write their names in the log book for that day. The officer's request to use comp time, up to and including same-day requests, will be granted if the log book does not indicate "Full" or "No more," under the circumstances explained below. Apx. at 1381-1382, 1396.

Officers' comp time requests are regularly granted. Apx. at 1381. The commanding officer/supervisor ("CO") of each precinct or bureau monitors that unit's log book to ensure that each shift is adequately staffed. The number of officers allowed to take time off at any one time in each unit is determined by the current circumstances of that particular unit. If the CO determines that any further requests for time off for any one shift may adversely affect the functioning of the unit, the CO may indicate that no further time off (including comp time) may be granted for that shift by drawing a line under the last name and entering "Full" or "No more" on the log book. Apx. at 1397. As a general policy, officers are not called in on an OT basis in order to permit another officer to use comp time, though reserve officers may be called in for this purpose. *Id.* As a result of this policy, on occasion officers' requests for use of comp time have been denied. Apx. at 1381.

The OT policy is applied flexibly so as to meet the needs of individual officers as well as unit needs. For example, on occasion, even after the CO has cut off comp time use for a given shift, additional time off has been requested and allowed. Conversely, it has occasionally become necessary to cancel comp time previously given when officers' illnesses or injuries caused staffing to dip below required levels.

Officers seeking to use comp time after the maximum number of requests have been granted have the option of securing a suitable replacement from the ranks of reserve officers. Apx. at 1123, 1397.

No individual officer has ever filed a grievance concerning the denial of comp time use, nor has the MPA.

"Location When Ill" (LWI) Policy

The City provides paid sick leave whereby officers receive their normal hourly compensation while being excused from work due to a reported illness or on-the-job injury that prevents them from performing their job duties. Apx. at 656, 659-660. For employees on sick leave the City maintains a "Location When Ill" (LWI) policy. *Id.* As its name implies, the LWI policy requires employees to notify the Department of their location while on sick leave. Originally published by the Memphis Police Department as DR 1104, it provides in relevant part:

> A member reporting sick or injured shall be confined to his or her residence, clinic, or hospital, except to visit his or her personal physician or by permission of his or her supervisor.[3]

Apx. at 659. One reason for the policy is to dissuade employees from the inappropriate practice of using "sick" days as additional vacation days. Apx. at 647, 708-711, 784.

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3. In recent years DR 1104 was clarified to require an employee on sick leave to remain at home only during the eight-hour block of time that would normally constitute his or her work day. (Apx. at 660).

Under this policy, an employee on sick leave may leave home to see a physician, or may leave home for other reasons with the supervisor's permission. Apx. at 656. By its own terms, DR 1104 places no restrictions on an employee's activities while at home on sick leave, the only requirements relating to notice and permission. Apx. at 646-647, 656, 659, 782. Under the policy, employees on sick leave are not required to remain fit for duty, nor are they subject to being called in to work while on leave. *Id.* Apx. at 706, 719-710. Several Plaintiffs have admittedly engaged in a wide range of personal activities while on sick leave, including activities outside the home, while others acknowledged that while on sick leave they did not feel physically capable of doing many everyday activities. Apx. at 647, 706, 718-725, 727-730, 782.

Over the years there have been only a few isolated instances of officers being disciplined for violation of the LWI policy. Apx. at 713-716. One officer was disciplined for using sick leave to work a second job without permission. Apx. at 807-808. No officer has been terminated for an alleged violation of the policy since January 1990. Apx. at 648.

As indicated, the Memoranda of Understanding between the City and the MPA contain grievance procedures for addressing these kinds of issues. No Plaintiff has ever filed a grievance with respect to the application of the LWI policy or to challenge discipline issued thereunder. Apx. at 648, 657, 785. Pursuant to its Charter and ordinances, the City operates under civil service provisions which cover severe disciplinary measures, such as termination, demotion, or suspension without pay for more than 10 days. There was no evidence that any officer has ever challenged the application of the LWI policy through the civil service process. Apx. at 648, 708-711, 785.

B. Proceedings Below

On the comp time issue, pursuant to Fed. R. Civ. P. 52(a) the district court issued detailed findings of fact and conclusions of law (Apx. at 1388) and a judgment for the City (Apx. at 1409), based on the terms of the Memoranda which the parties had negotiated. The court found that the arrangement, based on minimum staffing needs of each unit at any given time, complied with the FLSA requirement that an employee be permitted to use accrued time within a reasonable period after making a request if such would not unduly disrupt agency operations. The court also noted that DOL regulations acknowledge that through an agreement or understanding the parties can determine what is a reasonable period, which they did in this case.

On the LWI policy, the district court granted summary judgment to the City, rejecting Plaintiffs' claim that they were entitled to OT pay for all their waking hours while home on sick leave. Apx. at 1005. Such did not constitute "hours worked" under the FLSA. The court determined after a careful examination of the record that DR 1104, as written and applied, was not so onerous as to effectively prevent Plaintiffs from using their leave time for personal pursuits. Apx. at 1014. Upon reviewing and analyzing additional affidavits which the Plaintiffs submitted, the district court reaffirmed its earlier findings in a subsequent ruling. Apx. at 1058-1062.

In a carefully reasoned opinion, the Sixth Circuit Court of Appeals affirmed the district court on these rulings.

REASONS FOR DENYING THE WRIT

There are no "compelling reasons" to justify the granting of a writ of certiorari. S. Ct. Rule 10. Applying the illustrative reasons contained in Rule 10, petitioners make no claim that the Sixth Circuit's decision conflicts with that of any another United States court of appeals or with that of any state court of last resort. Nor do petitioners allege that the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Rather, petitioners assert that the Sixth Circuit (1) decided an important question of federal law that has not been, but should be, settled by this Court; and (2) decided an important federal question in a way that conflicts with relevant decisions of this Court. Careful scrutiny belies both assertions.

Indeed, the asserted errors in this case focus on factual nuances and the application of particular facts to properly stated existing law, a situation in which a petition "is rarely granted." S. Ct. Rule 10. Further, the fact-specific nature of this case, unlikely of repetition, does not lend itself to precedent-setting results.

I. THE LOWER COURTS' DECISION REGARDING COMPENSATORY TIME DOES NOT INVOLVE AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT, AND *CHRISTENSEN v. HARRIS* IS INAPPOSITE.

As petitioners note, in *Christiansen v. Harris*, 120 S. Ct. 320 (Oct. 12, 1999) this Court has agreed to consider whether the FLSA permits a public agency to require its employees to use accrued compensatory time, rather than

giving the employees the option of receiving overtime pay, "absent a pre-existing agreement." Pet. for Writ of Cert. at 19. This case presents precisely the opposite question: Where an agreement between the employer and union-represented employees does exist, and the agreement gives employees the option of choosing between overtime pay and compensatory time, does the FLSA permit a public agency to apply its compensatory time rules?

These are absolutely critical distinctions, as both lower courts in this case stressed as a dispositive point the application of bargained-for agreements (Memoranda of Understanding) governing compensatory time.

The district court decided this issue following a full exploration of the documented facts at trial, and issued detailed and specific findings of fact relating to it. The Court of Appeals examined the same record and reached the same conclusion. The lower courts' determinations arose out of the particularized fact setting of this case, including specific provisions of the parties' negotiated agreement and specific circumstances relating to the needs of Memphis police units to be adequately staffed for the protection of the public. These are not circumstances likely to recur at any other time and place. As such, they do not lend themselves to Supreme Court review.

Moreover, the lower courts' fact-specific analysis follows closely the very DOL regulations upon which Petitioners rely. The regulation on the "reasonable period" determination looks to "the customary work practices within the agency based on the facts and circumstances in each case." 29 C.F.R. § 553.25(c)(1). Similarly, the DOL's regulation defining the term "unduly disrupt" refers to

anticipated situations that "would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public" during the employee's absence. 29 C.F.R. § 553.25(d).

Even accepting *arguendo* the point of view articulated by the dissenter in the Court of Appeals, which Petitioners now stress, what we have here is a "difficult, mixed question of fact and law." *Aiken v. City of Memphis*, 190 F.3d 753, 764 (6th Cir. 1999) (Ryan, J., dissenting). Again, such questions do not merit review by this Court, especially where, as here, the results affect only the immediate parties.

II. THE LOWER COURTS' DECISION REGARDING THE CITY'S "LOCATION WHEN ILL" POLICY DOES NOT CONFLICT WITH THIS COURT'S DECISIONS, BUT IS COMPLETELY CONSISTENT WITH THEM.

The district court decided this issue on summary judgment, based on undisputed facts and well-established principles of law as articulated by this Court.

Petitioners base their argument on incorrect factual premises. They assert that the City's LWI policy confines officers on sick leave to their home 24 hours a day. As both lower courts noted, the LWI policy imposes no such requirement, and as shown, Petitioners' own testimony revealed that they can and do engage in personal pursuits while on sick leave. Petitioners correctly note that they are not on call, a distinction which explains why the FLSA does not require that they be paid overtime (in addition to their regular sick leave pay) as if they were at work.

Far from deciding a federal question in a way that conflicts with relevant decisions of this Court, the lower courts' approach to the LWI policy reaffirms the Court's central point that in enacting the FLSA, Congress ensured that each covered employee receives "a fair day's pay for a fair day's work." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981), quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942). In addressing overtime pay requirements, the Act itself requires overtime pay for "hours worked" beyond a certain number of hours per pay period. 29 U.S.C. § 207(a). The City's LWI policy does not convert time spent at home on sick leave into "hours worked."

Petitioners cite two inapposite cases, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) and *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), as decisions by this Court with which the courts' decisions in this case conflict. Petitioners declare that these cases, and a related DOL regulation, establish that "time spent at home *on call may* be compensable *under certain circumstances*." Pet. for Writ of Cert. at 23 (emphasis added). As *Skidmore* and *Armour* show, firefighters on stand-by alert and ready for duty, or employees who must remain on or near the employer's premises for special duty, may qualify. Employees home on sick leave, engaging in personal pursuits and not subject to being called to work, plainly do not. Moreover, as this Court observed in *Armour*, such determinations are "dependent upon all the circumstances of the case." *Armour*, 323 U.S. at 133. Once again, these fact-specific situations are not appropriate for this Court's review.

CONCLUSION

For the foregoing reasons the petition should be denied.

Respectfully submitted,

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